No. 3320 //

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al.,
Appellants,

vs.

L. A. PEDERSEN,
Appellee.

BRIEF FOR APPELLEE.

PILLSBURY, MADISON & SUTRO,
A. E. ROTH,
Proctors for Appellee.

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BRIEF FOR APPELLEE.

This is an action by some 190 fishermen to recover the sum of $438.75 each from the appellee. The libel sets up two causes of action. The lower court sustained exceptions to both causes of action and this is an appeal from the court's ruling sustaining the exceptions.

Argument.

THE FIRST CAUSE OF ACTION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR DAMAGES.

As grounds for the first cause of action it is alleged that under the contract of hiring between the appellants and appellee, the appellee agreed to pay the ap-

pellants three and a quarter cents for each Red or Coho salmon offered for delivery at his cannery in Alaska; that the contract further provided that the canneries should employ no less than three beachmen for every line of cannery machinery for tall cans operated; that the appellee had eight lines of cannery machinery, and employed at no time in excess of seventeen men; that his machinery was defective, in that it was constantly getting out of order, and for that reason appellee was unable to take the fish from appellants as they caught them, and their boats in which they caught salmon, were detained in making deliveries. That if the appellee had had proper machinery and a sufficient number of beachmen to operate the machines, he would have been able to have taken at least 1500 fish per day for 30 days.

The libel does not allege that the appellee agreed to operate any particular number of lines of canning machinery, or that he was at fault in providing defective machinery, but simply alleges that he had eight lines of canning machinery, and that it was defective in this, that it was constantly getting out of order.

It is difficult to determine from the allegations of the libel, whether the loss, which the appellants contend that they sustained by reason of profits which they would have received had the appellee accepted 1500 fish per day, resulted from the failure of appellee to maintain any particular number of canning machines and to keep such machinery in proper order, or by reason of a failure to provide a sufficient number of beachmen. Neither does the libel allege that the libelants

caught and tendered to the libelee at any time, any greater number of fish than 1200 per day.

It appears from the allegations of the libel, that the appellee by the terms of the contract, was empowered to limit the number of salmon that he was bound to pay for, to 1200 fish in each 24 hours. There is no contention that the appellee did not accept and pay for this number of fish, but on the contrary it appears that the appellee did take at least 1200 fish per day.

Inasmuch as he was authorized to limit the number of fish which he was obliged to accept, the fact that he could not handle more, or that the appellants could have caught any greater number, becomes immaterial.

If the appellants had caught 5000 fish, or any other number of fish per day in excess of 1200, and if the appellee had had sufficient machinery to care for all the fish caught, he would still have had the right, under his contract, to limit the number which he would take and pay for, to 1200 fish per day, and as this is the measure of the amount which the appellants, under any circumstances, could compel the appellee to pay for their services, they certainly state no cause of action for any greater sum by merely alleging that if there had been better facilities for handling the fish, they could have caught more.

The libel does not allege that the contract provided that the appellee would take all the fish that were caught by each of the appellants, but merely states that the taking of all the fish which each might catch was the principal inducement for entering into the contract of hiring.

In view of the express provision of the contract, giving the appellee the right to impose a limit of 1200 fish, counsel's contention that there was an implied agreement to take all the fish that the fishermen might catch, is, of course, untenable. The libel shows that the appellee did take at least 1200 fish per day, and the men certainly knew, when they signed the libel, that their earnings under the limit clause could be confined to this amount. In view of the allegation that at least 1200 fish were taken, any speculation with respect to what might happen under the contract, if the appellee had had no machinery, or had taken no fish, is not in point.

Counsel for appellants' contention that the appellee's right to put the men on a limit of 1200 fish per day could only be exercised when appellants were offering more salmon than he could handle with 24 beachmen at work, is not borne out by the allegations of the libel. A reading of the libel will show that the right to place the men on limit was apparently unconditional. If the appellee had the right to place the men on a limit of 1200 fish at a time when he had sufficient beachmen and sufficient machinery, which right he apparently had, then it is difficult to see how the appellants can be damaged by a failure to furnish sufficient beachmen or sufficient machinery, at a time when they are in fact on the limit.

According to the allegations of the libel the machinery and beachmen furnished were sufficient to care for at least 1200 fish. In view of appellee's right to place a limit of 1200 fish, the only state of facts under which the appellants could be damaged would be where it

appeared that the machinery or the number of beachmen was insufficient to care for some amount of fish less than 1200 fish, and that appellants had tendered such an amount which had not all been taken because of such insufficiency.

THE SECOND CAUSE OF ACTION DOES NOT STATE SUFFICIENT FACTS TO CONSTITUTE A CAUSE OF ACTION FOR DAMAGES.

The second cause of action is founded upon the following allegation in the contract of employment:

> "If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given. Boats to report at time of arrival at receiving station. The same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station."

The libel sets out this provision of the contract, and then states that on the 5th day of July, 1918, the appellants were prevented from delivering fish by reason of the failure to unload their boats for a period of 24 hours, and that by reason of this delay in unloading their boats they each became entitled to a credit of 5700 salmon. The latter figure is arrived at by adding 25% additional to the 1200 salmon which were offered for the first six hours of the delay, and an additional 25% for each hour's delay thereafter.

As pointed out by His Honor, Judge Dooling, in his opinion in the lower court, if the appellants had not

been prevented from fishing by reason of the delay, they could not have received pay for more than 1200 salmon, which amount they were credited with. Since the contract fixes the exact number for which they could have received pay, had they not been prevented from fishing, it is, of course, unreasonable, as pointed out by the lower court, to allow them nearly five times as many salmon as they could have been paid for had they worked.

We respectfully submit that there can be no question but that the clause upon which the second cause of action is based, provides, and was intended by the parties to provide, for a penalty pure and simple, and was not intended to provide for stipulated damages.

In the case of *Stennick v. Jones,* 252 Fed. Rep. 345, at page 353, lately decided by Your Honors, the rule respecting penalties is stated as follows:

> "The principle which controls and as upheld in Sun Printing & Publishing Co. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, is that the intent of the parties is to be arrived at by a proper construction of the agreement; and whether a particular stipulation to pay a sum of money is to be regarded as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, and it is the duty of the court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

In the recent case of *Board of Commerce of Ann Arbor, Mich. v. Security Trust Co.,* Circuit Court of Appeals, 6th Circuit, 225 Fed. Rep. 454, at 460, the court says:

> "If the contract is construed to mean 'liquidated damages' the recovery for the breach is the sum

> stipulated without proof of actual damage. If it is construed to mean penalty the recovery is only for the actual damage sustained * * * ''

In *Sun Printing & Publishing Assn. v. Moore,* 183 U. S., at page 662, the court says:

> ''The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not *bona fide,* in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreement ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Thus, Chief Justice Marshall, in Tayloe v. Sandiford, 7 Wheat. 11, although deciding that the particular contract under consideration provided for the payment of a penalty, clearly manifested that this result was reached by an interpretation of the contract itself.''

Under these decisions the question to be here determined is ''Does this contract when properly construed show an intention to provide a penalty, or does it show an intention to provide liquidated damages?''

One of the first and most important considerations in determining this question is the relation of the amount provided to be paid to the actual damage sustained. In the case of *In re Liberty Doll Co.* (242 Fed. 695, at 701) the court says:

> "Two rules are well established:
>
> 1. That where the sum agreed upon is so great as to be unconscionable, it will be regarded as a penalty.
>
> 2. That where the stipulated amount is disproportionate to presumable and possible damages, or to a readily ascertainable loss, the courts will treat it as a penalty."

We are not unaware of the language used in the case of *Sun Printing & Publishing Ass'n v. Moore* (183 U. S. p. 660), and cited by counsel for appellants in pages 12 and 13 of his brief.

We submit however that even the Sun Printing Co. case is authority for the proposition that the disproportion of the amount to be paid to the actual damage is an important element in determining the intention of the parties. On page 672 the court says:

> "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

This is further indicated by the court's discussion on page 668 of the opinion of the decision rendered in the case of *Ward v. Hudson River Building Co.,* 125 N. Y. 230.

In the case of *U. S. v. United Engineering Co.,* 234 U. S. 236, at 241, the Supreme Court refers to the Sun Printing Co. case and says:

> "Such contracts for liquidated damages when reasonable in their character are not to be regarded as penalties, and may be enforced between the parties." (Citing Sun Printing and Publishing Co. v. Moore, supra.)

This language by the Supreme Court clearly indicates that it does not consider that the Sun Printing Co. case has abolished the rule that there must be a reasonable proportion between the amount to be paid and the actual damage.

In the very well considered case of *Northwestern Terra Cotta Co. v. Caldwell* (8th Circuit, 234 Fed. p. 491, at 498), after quoting from the Sun case Judge Smith says:

> "In all this there is nothing throwing any light upon the question now under consideration, but certain language is used by Mr. Justice White in his very able opinion, which it is claimed applies to the case at bar. In view of the learning displayed in the opinion it is with some hesitancy that we call attention to the fact that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. * * * In the case under consideration, Sun Printing & Publishing Assn. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, if suit had been delayed for substantially 10 years, the usual period of limitations on written contracts, and the owner of the yacht had then brought suit for $500 a day, or for $1,750,000, under the demurrage clause noticed, and the court had held that he was entitled to recover in that amount for the use of a yacht worth $75,000, the case would have been quite in point, but that question was not raised."

Inasmuch as the Sun Printing Co. case was a case of an agreed valuation of property it is no more in point on the facts of this case than it was in the case of *Northwestern Terra Cotta Co. v. Caldwell,* supra.

The above analysis by Judge Smith of the decision in the Sun case finds support in the case of *McCall v. Deuchler,* 174 Fed. at page 134, in which Judge Hook says:

> "This is not a case of an agreed valuation of property, like that of Sun Printing and Publishing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; nor is it one in which the amount of actual damage is difficult of ascertainment. The contract was the common one of sale and purchase of articles of trade, for the breach of which the law prescribes a clear and definite measure of damages. The provision in the contract ignores this measure altogether, and fixes an arbitrary amount which is grossly in excess of all loss that could possibly have been sustained. This is manifest from the face of the contract itelf. Extrinsic evidence is not necessary to disclose it".

In the case at bar the contract fixes the amount which the appellants could earn during the time they were delayed, to wit, pay for 1200 fish, and this is manifest from the contract itself. No extrinsic evidence is necessary to show the unconscionable disproportion between the amount claimed and the actual damages. In the McCall case the law fixed a definite measure of damages, here the limit clause of the contract fixes the measure.

When we apply the test of disproportion of amount to be paid to the amount of damage sustained, in the

case at bar, it is at once apparent that the parties must have intended a penalty, for as pointed out by the lower court, the amount stipulated to be paid is over four times the amount which the appellants could possibly sustain as damages. If the appellants had worked during the time they were delayed, they could only have earned pay for 1200 fish for each 24 hours, and the actual amount of their damage is limited to pay for this amount of fish. It therefore appears on the face of the contract that the amount claimed, to wit, credit for 5700 fish, is out of all proportion to the ascertainable loss, to wit, 1200 fish.

Another circumstance showing intention to provide a penalty is the fact that the contract makes a distinction between the first six hours delay and subsequent hours. There is no apparent reason why subsequent hours should be placed on a different basis than the first six hours so far as the amount of damage sustained is concerned, which indicates that the parties were not attempting to fix the amount of damage.

The fact that the contract provides that the rule shall apply when the boats are on the limit, conclusively proves the parties intended a penalty, and not liquidated damages. Inasmuch as the appellee was compelled to pay for at least 1200 fish every 24 hours, whether he took them or not, when the boats were on a limit, it is apparent that the men could suffer no damage at all by delay in taking the fish, and the provision for extra credit is therefore a penalty pure and simple.

It is no answer to the above proposition to say that the men were obliged to discharge their boats once a day, and to deliever their salmon in good condition. If they were prevented from delivering once each day, or from delivering salmon in good condition, by reason of appellee's delay, they certainly would be excused from complying with these conditions, and would be entitled to their limit, notwithstanding their failure to comply therewith.

While it is well settled that the mere use of the terms "penalty," "liquidated damages," etc., or the omission of these terms, is not conclusive as to the true construction of the contract, yet the use or omission of such words is a circumstance entitled to consideration in arriving at the intention of the parties.

In the case of *Blewett v. Front Street Cable Rwy. Co.,* 51 Fed. Rep. at 627, His Honor, Judge Gilbert, says:

> "It is true the bond by its language does not declare that $18,000 shall be deemed liquidated damages in case of breach. This omission, though a strong circumstance, is not a controlling consideration in construing the bond. The court may construe the penalty as liquidated damages in cases where the parties have not nominated it. The construction will depend upon the intention of the parties, to be ascertained from the whole tenor and subject of the agreement."

In the case at bar the contract makes no reference to stipulated or liquidated damages, and, as pointed out by His Honor, Judge Gilbert, this is a strong circumstance to be considered in construing the contract.

For the foregoing reasons we respectfully submit that the provisions of the contract upon which the second cause of action is based, when properly construed, show an intention to provide a penalty which is sought to be recovered and that the exceptions to both causes of action were properly sustained.

Dated, San Francisco,
May 24, 1919.

Respectfully submitted,

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